



DELAWARE PUBLIC INTEGRITY COMMISSION

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TO: Cabinet Secretaries

FROM: State Public Integrity Commission

DATE: May 22, 1998

SUBJECT: **Ethics Bulletin 007 - Post Employment**

Recently, an agency expressed concern that the post-employment provision needed clarification. The agency said it apparently could hire former employees on a casual/seasonal basis to work on matters where they gave an opinion, etc., after they left State employment, but could not privately contract with former employees for the same work. For example, a former employee leaves state employment, goes into business for themselves, and then seeks to contract with their former agency to perform essentially the same job they previously held. See, Commission Op. No. 97-18.

The post-employment restriction provides:

No person who has served as a state employee, state officer or honorary state official shall represent or otherwise assist a private enterprise on matters involving the State, for a period of 2 years after termination of employment or appointed status with the State, if the person gave an opinion, conducted an investigation, or otherwise was directly and materially responsible for such matter in the course of official duties as a state employee, officer or official. Nor shall any former state employee, state officer or honorary state official disclose confidential information gained by reason of public position nor shall the person otherwise use such information for personal gain or benefit. 29 Del. C. § 5805(d).

In discussing the federal post employment provision similar to Delaware's, the United States Congress noted: like other conflict of interest statutes, post employment provisions are meant to insure public confidence in the integrity of the government. "*Ethics in Government Act*," *Senate Report No. 95-170*, p. 32. It said public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. Id. There is a sense that a "revolving door" exists between industry and government ...[which] leads to

a suspicion that personal profit was the motivation. *Id.* There also is public concern that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post employment laws set a “cooling off period” in certain areas which the ex-employee dealt with while working at the agency. *Id.*

Similarly, the Delaware Legislature sought to insure public confidence in the integrity of government. 29 *Del. C.* § 5802. It set a two-year “cooling off period” in areas where the former employee was “directly and materially responsible,” etc. 29 *Del. C.* § 5805(d). This limits the actual or perceived unfair advantage in subsequent dealings with a department or agency. *Commission Op. No. 97-18.* Thus, this Commission has held that Delaware’s post-employment provision is an attempt to eliminate concerns that when a State employee moves from State employment to private employment that they do not use their former State position to get a “leg-up” on others in the private sector who also seek to deal with the government. *Commission Op. No. 97-11.* Additionally, it is to avoid the risk that after a State employee moves to the private sector that they will not exercise undue influence on their former colleagues. *Commission Op. No. 96-75.*

Looking first at the statutory language, we first note that it applies to “former employees” who represent a “private enterprise on matters involving the State.” Under the personnel law, casual/seasonal employees are, “employed by the State.” 29 *Del. C.* § 5903(17)(a). They also are State employees under the Code of Conduct. 29 *Del. C.* § 5804(11)(a) (“*State employee*” means persons who receive compensation as an employee of the State). Thus, they are current, not former, employees. Also, when casual/seasonal employees work on “matters involving the State,” they do not represent a “private enterprise,” as the definition does not include the State as a private enterprise, but separately and distinctly defines “State.” 29 *Del. C.* § 5804(8) and (9).

The distinction between “casual/seasonal employees” and “former employees” also is consistent with the statutory purpose. Hiring standards for casual/seasonal employees are set by State laws and State personnel rules regarding the amount of salary, length of employment, etc. Conversely, a former employee who seeks a private contract can negotiate with their former agency for these terms. Thus, they have an opportunity to influence former colleagues. They could negotiate a higher salary than they had while employed by the State or a higher salary than current employees or casual/seasonal employees in the same position. This raises the specter of financially capitalizing on their former employment and obtaining an unfair advantage. The following illustrates some differences between “casual/seasonal employees” and “former employees” hired by contract:

	<u>Casual/Seasonal</u>	<u>Contractors</u>
Time Limits on Employment	Set by law	Can negotiate
Salary Limits	Set by law	Can negotiate
Benefits	Benefits denied by law e.g., no leave, medical, etc.	Can negotiate for benefits or for salary sufficient to cover such benefits
Disciplinary actions (such as firing)	No right to grieve	Can challenge on basis of contract terms
Receipt of Pension	Former employees who retire and are entitled to a State pension, then are hired as a casual/seasonal, can have their pension reduced while on the State payroll.	No reduction in pension

Thus, by law, casual/seasonal employment does not hold the enticements a private contract holds. The statutory limits on casual/seasonal employees set across the board standards which the former employee cannot influence and insures equal standards for those seeking the positions. On the other hand, the private contract gives the former employee a chance to: (1) financially benefit more than if hired as a casual/seasonal; and (2) influence former colleagues' decisions on hiring, salary, etc.

cc: Governor Thomas R. Carper

[Note: When this bulletin was issued, retirees who were re-hired as casual/seasonal employees had a pension offset. On August 12, 2002, Governor Ruth Ann Minner signed into law Senate Bill 439. That law amends 29 Del. C. §§ 5303(a)(1) (c) and 29 Del. C. §§ 5502(a)(3), to allow pensioners under the State Employees Pension Plan to be employed by the State in a temporary, casual, seasonal, or substitute position without any earnings limitations or without affecting their current pension benefits.]